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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 91–1)

APPROVAL OF FRANCISCO J. ROVIRA, d/b/a INTERNATIONAL MARINE CONSULTANTS AS AN APPROVED COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of Francisco J. Rovira, d/b/a International Marine Consultants, as a commercial gauger.

SUMMARY: Pursuant to Part 151.13 of the Customs Regulations (19 CFR 151.13), Francisco J. Rovira, d/b/a International Marine Consultants, of Hato Rey, Puerto Rico applied to Customs and received conditional approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils in bulk and liquid form. Customs has determined that Mr. Rovira meets the requirements for unconditional approval.

Therefore, in accordance with Part 151.13(c), Francisco J. Rovira, d/b/a/ International Marine Consultants, 429 Padre Rufo Street - Floral Park, Hato Rey, Puerto Rico 00917 (P.O. Box 6085, Old San Juan, Puerto Rico 00903) is unconditionally approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: December 10, 1990.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, Room 7113, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202-566-2446).

Dated: December 17, 1990.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, December 20, 1990 (55 FR 52238)]

(T.D. 91–2)

REVOCATION OF COMMERCIAL GAUGER APPROVAL AND COMMERCIAL LABORATORY ACCREDITATION OF CHARLES *v.* BACON, INC. OF HARVEY, LOUISIANA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of approval and accreditation of a commercial gauger and commercial laboratory.

SUMMARY: Charles V. Bacon, Inc., of Harvey, Louisiana has notified the U.S. Customs Service that they will be ceasing all gauging and laboratory operations. Therefore, pursuant to Section 151.13, Customs Regulations (19 CFR 151.13), the commercial gauger approval and commercial laboratory accreditation granted to Charles V. Bacon have been revoked in full.

EFFECTIVE DATE: December 1, 1990.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, Room 7113, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202-566-2446).

Dated: December 17, 1990.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, December 20, 1990 (55 FR 52238)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–124)

TRENT TUBE DIVISION, CRUCIBLE MATERIALS CORP.; ARMCO SPECIALTY STEEL DIVISION; DAMASCUS TUBULAR PRODUCTS; ALLEGHENY LUDLUM CORP.; CARPENTER TECHNOLOGY CORP.; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AVESTA SANDVIK TUBE AB AND AVESTA STAINLESS, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 87-12-01189

[The remand determination of the International Trade Commission is affirmed.]

(Dated November 27, 1990)

Collier, Shannon & Scott (*David A. Hartquist, Kathleen Weaver Cannon* and *Nicholas D. Giordano*), for plaintiffs.

Lynn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*William T. Kane*), for the defendant.

Freeman, Wasserman & Schneider (*Jack Gumpert Wasserman* and *Patrick C. Reed*), for the defendant-intervenors.

MEMORANDUM OPINION

CARMAN, *Judge*: Defendant-intervenors, Avesta Sandvik Tube, AB (AST), contest the remand results in *Welded Stainless Steel Pipes and Tubes From Sweden*, Inv. No. 731-TA-354 (Final) (Remand), USITC Pub. 2304 (Aug. 1990). Defendant, United States International Trade Commission (Commission or ITC), opposes AST's challenge and seeks to sustain the remand determination as supported by substantial evidence on the record and as otherwise in accordance with law. Plaintiff (Trent) joins defendant.

I. BACKGROUND

This case grew out of plaintiff's challenge to the final determination of defendant, that an industry in the United States was not materially injured by reason of welded stainless steel pipe and tubes from Sweden. *See Stainless Steel Pipes and Tubes from Sweden*, Inv. No. 731-TA-354 (Final), USITC Pub. No. 2033 (Nov. 1987). On June 20, 1990, this Court issued *Trent Tube Div. v. United States*, 14 CIT ____, 741 F. Supp. 921, Slip Op. 90-58 (June 20, 1990), *modified*, 14 CIT ____, 741 F. Supp. 227 (1990), Slip. Op. 90–66 (July 6, 1990), which remanded to the ITC the

determination of Chairman Liebeler with instructions to evaluate the determination under the proper statutory test.[1]

On August 6, 1990, pursuant to the remand, the ITC issued *Welded Stainless Steel Pipes and Tubes From Sweden*, Inv. No. 731TA-354 (Final) (Remand), USITC Pub. 2304 (Aug. 1990). By a two-to-two vote, the Commission determined that:

> [A]n industry in the United States is materially injured by reason of imports of welded stainless steel pipes and tubes from Sweden, that have been found by the Department of Commerce to be sold in the United States at less than fair value.

See Tariff Act of 1930 § 735(b), 19 U.S.C. § 1673d(b) (1988). Commissioner Lodwick, who reached an affirmative determination, readopted his original views in their entirety on the remand.[2] Acting Chairman Brunsdale and Commissioner Rohr made negative determinations on the remand and readopted their respective views in their entirety. Commissioner Newquist, who replaced Chairman Liebeler since the original final negative determination, made an affirmative determination of injury on the remand based upon the record before the Commission in its original investigation. As a result of Commissioner Newquist's determination, the final determination of the ITC on the remand became *affirmative*. *See* 19 U.S.C. § 1677(11) (1988).[3] Defendant-intervenors AST challenge the remand determination.

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[1] Voting in the negative majority were Chairman Liebeler, Vice-Chair Brunsdale, and Commissioner Rohr. Commissioners Eckes and Lodwick voted in the affirmative. In Slip Opinion 90-58, this Court determined that the negative views of Vice-Chair Brunsdale and Commissioner Rohr were supported by substantial evidence on the record and were otherwise in accordance with law. However, this Court found that Chairman Liebeler erred in part in reaching her determination and remanded the case to the ITC with instructions that it evaluate the investigation in relation to the factors outlined in 19 U.S.C. §§ 1677(7)(C)(iii) and (B)(i)(III) (1988), and comply with 19 U.S.C. § 1677(7)(B) (1988).

Slip Opinion 90-58 contained an error involving the reference to the post-1988 antidumping statute, instead of to the applicable pre-1988 statute. Finding the error harmless, this Court modified slip Opinion 90-58 by issuing slip Opinion 90-66, dated July 6, 1990, which reflected a correction of the error. In Slip Opinion 90-66, this Court referred to its directions to the ITC in open court to employ 19 U.S.C. § 1677(7)(B)(iii) (1982) and 19 U.S.C. § 1677(7)(C)(iii) (1982) specifically and to apply the 1982 statute "where applicable" in carrying out its remand. Slip Opinion 90-66 at 3. This Court then concluded in Slip Opinion 90-66 that:

> [I]ts analysis in slip opinion 90-58 was not affected by the citation to the 1988 section and that its analysis applied in the same manner as though the Court had cited the 1982 section as the basis for its determination.

Slip Opinion 90-66 at 3.

Citing the "law of the case" doctrine as authority, defendant-intervenor Avesta Sandvik Tube AB (AST) argues that this Court's remand instructions somehow bind the ITC to follow the partial work product contained in Commissioner Liebeler's determination as to the price effect and import volume factors under the statute, simply because this Court found those factors to have been "addressed" by Commissioner Liebeler. See Slip Opinion 90-58 at 9.

If this Court were to accept that argument, not only would Liebeler's successor Commissioner Newquist be bound to her price effect and import volume findings, but presumably all other members of the Commission would be similarly bound. This would cause an absurd and legally questionable result. It is not the role of this Court to diminish the fact-finding role of the agency in such a manner; such action would undermine the principal long recognized by this Court that it "may not substitute its judgment for that of the [agency] * * *." *American Sprina Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom., Armco. Inc. v. United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). The purpose of a remand generally is to require the agency to explain its determination or where appropriate, correct its determination. *See, e.g., SCM Corp. v. United States*, 2 CIT 1, 7, 519 F. Supp. 911, 916 (1981).

Although this Court did not find that all parts of the Liebeler determination contained error, it nevertheless held in Slip Opinion 90-58 that the Liebeler opinion as a whole was unsupported by substantial evidence or otherwise not in accordance with law because she failed to apply the proper statutory test outlined in 19 U.S.C. § 1677(7)(B) and (C). Slip Opinion 90-58 at 12. Commissioner Newquist, as set forth elsewhere in this opinion, examined the relevant data in the record, applied his findings of fact to the statutory requirements, and came to a different conclusion than Commissioner Liebeler. This Court recognizes that reasonable minds can draw different inferences from the same record. *See Fischer & Porter Co.. Inc. v. U.S. Int'l Trade Comm'n*, 6 Fed. Cir. (T) 22, 24, 831 F.2d 1574, 1577 (1987). Based upon this rationale and for the reasons set forth elsewhere in this opinion, this Court holds that the determination of Commissioner Newquist is supported by substantial evidence on the record and in accordance with law.

[2] Commissioner Eckes, who joined in Commissioner Lodwick's views in the original minority determination, left the Commission before the remand determination was due and took no part in the remand determination.

On August 22, 1990, this Court heard Trent's motion requesting that defendant and AST show cause why the remand determination should not be summarily affirmed and the action dismissed or, in the alternative, seeking to enjoin the liquidation of entries of the subject merchandise pending affirmance of the ITC's determination.[4] At the close of that hearing, this Court allowed a brief comment period directed to the narrow question of whether the ITC complied with the remand instructions issued by this Court.

On September 28, 1990, this Court invited further briefing directed to the question of whether the ITC's remand determination was supported by substantial evidence on the record and otherwise in accordance with law.

The Court is now presented with the question of whether the remand determination of August 6, 1990, complied with the order of the Court as to its remand instructions and whether the remand determination is supported by substantial evidence on the record and otherwise in accordance with the law. See 19 U.S.C. § 1516a(b)(1)(B) (1988).

II. Contentions of the Parties

AST asserts that the August 6, 1990, remand determination does not comply with this Court's specific remand instructions as provided for in Slip Opinions 90-58 and 90-66. AST contends that Commissioner Newquist, who did not participate in the original proceedings, explicitly ignored this Court's instructions that the Commission explain Chairman Liebeler's analysis of the impact of imports on the domestic industry in relation to the factors outlined in 19 U.S.C. § 1677(7)(C)(iii) and 1677(7)(B)(iii) *See Views of Commissioner Don E. Newquist on Remand (Newquist's Views)*, USITC Pub. 2304, at 1 n.4.[5]

According to AST, Slip Opinions 90-58 and 90-66 constitute the so-called "law of the case", which requires Commissioners Lodwick and Newquist on remand to adopt the views of those Commissioners whose determinations were addressed by this Court in Slip Opinions 90-58 and

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[3] Pursuant to 19 U.S.C. § 1677(11), "If the Commissioners voting on a determination by the Commission are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination."

[4] This Court denied both motions in *Trent Tube Div. v. United States*, 14 CIT ___, 744 F. Supp. 1177, 1180, Slip Op. 90-83 (Aug. 28, 1990).

[5] Footnote 4 of Commissioner Newquist's Views provides:

> The Court's Opinion of June 20, 1990, contained the instruction to 'explain[] [Chairman Liebeler's] analysis[.]' Slip Op. 90-58 at 12. Because that instruction was deleted by the Court in its July 6, 1990 revision of the remand order, and because my analysis differs from the type set forth in Commissioner Liebeler's views, I have not provided any evaluation or explanation of Commissioner Liebeler's views. *See* SCM Corp. v. U.S., 519 F. Supp. 911, 915–916 (CIT 1981).

Welded Stainless Steel Pipes and Tubes from Sweden, Inv. No. 731TA-354, USITC Pub. 2304, at 1–2 n.4 (Aug. 1990). [#42, pp 1–2]

90-66 and found to have been supported by substantial evidence.[6] AST concludes that since the Commission's original determination was sustained in all respects except a portion of Chairman Liebeler's views, the remand instructions were naturally limited to providing an adequate explanation of those views. As previously pointed out, Commissioner Newquist did not endeavor to explain the analysis of Commissioner Liebeler, but rather applied his own analysis, keeping in mind the statutory test, to the facts as they appeared in the record. See supra note 1 and accompanying text.

Defendant maintains that the Commission was under no obligation to explain Chairman Liebeler's views and properly supplied a corrected determination. Defendant urges that AST's reliance upon the law of the case doctrine is misplaced because the Commissioners present on remand need not concur with the earlier views of their colleagues which this Court has found to have been based upon substantial evidence. *See SCM*, 2 CIT at 7, 519 F. Supp. at 916 (a remand order does not require individual responses by each of the Commissioners, but rather an "institutional response").[7] Defendant maintains that slip Opinions 90-58 and 9066 dispose of AST's claim that the views of the original Commission majority constituted the only legally valid interpretation of the evidence. Defendant further urges that this Court's finding that a portion of the original majority's views was supported by substantial evidence does not preclude other views from meeting that standard.

III. Discussion

In Slip Opinion 90-58, this Court held that the negative determinations of Vice-Chairman Brunsdale and Commissioner Rohr were supported by substantial evidence and were otherwise in accordance with law. This Court sees no reason to disturb these determinations. Furthermore, the Court notes that both Commissioners reaffirmed their previous determinations based upon the same record. Since the Lodwick determination was previously in the minority, this Court in Slip Opinion 90-58 declined as unnecessary to examine whether the statutory requirements for making a determination as to material injury had been met by Commissioner Lodwick. Commissioner Lodwick reaffirmed his views on the remand in their entirety.

This Court must examine the individual views of each Commissioner who made an affirmative determination on remand for compliance with

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[6] For example, AST interprets this Court's remand instructions directing the ITC to explain Chairman Liebeler's analysis in relation to the factors outlined in 19 U.S.C. § 1677(7) (C) (iii) and 1677(7) (B) (iii) as requiring the ITC to supply "further explanation of the impact of imports on the domestic industry." According to AST's papers, the "settled findings on low import volume, lack of price effect and limited fungibility" in the original determination constitute the law of the case, and, thus, any evaluation by the ITC on remand must occur within that context, i.e., not reach a contrary conclusion regarding those "settled" issues .

[7] The SCM court further opined that:

> [T]he contested determination was an institutional decision, and as such, can be explained *or corrected* on remand by the Commission, notwithstanding that the membership of the Commission has changed since the time the determination was originally reached.

2 CIT at 7, 519 F. Supp. at 916 (emphasis added).

this Court's remand instructions and to see if these determinations are supported by substantial evidence on the record or otherwise in accordance with law.

A. *The Legal Standard:*

This Court possesses the power to remand cases to the ITC pursuant to 28 U.S.C. § 2643(C)(l) (1988). The appropriate standard of review on remand is whether the ITC's remand determination is based upon substantial evidence on the record or otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). *See Washington Red Raspberry Comm'n v. United States,* 11 CIT 640, 670 F. Supp. 1004, 1005 (1987), *aff'd,* 859 F.2d 898, 902 (Fed. Cir. 1988).[8] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It is "some evidence, more than a mere scintilla, in light of the record as a whole." *Kenda Rubber Indus. Co. v. United States,* 10 CIT 120, 125, 630 F. Supp. 354, 358 (1986).

As a general proposition, an ITC determination is presumed correct by this Court and the burden rests on the party challenging it to show otherwise. 28 U.S.C. § 2639(a)(1) (1988). Moreover, when applying the substantial evidence standard, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. * * *'" *American Spring Wire,* 8 CIT at 22, 590 F. Supp. at 1276 (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)).

B. *The Remand Instructions:*

This Court's remand instructions called on the Commission to correct the error of one of its members, Chairman Liebeler, that operated to taint the entire resulting negative determination. Slip Opinion 90-58 at 12. Further, to guide the Commission in its efforts on remand, this Court in Slip Opinion 90-58, as modified by Slip Opinion 90-66, identified those portions of the statute that Chairman Liebeler did not appear to address, namely 19 U.S.C. § 1677(7)(B)(iii) and (c)(iii) (1982). *See* Slip Opinions 90-58 at 9, 90-66 at 3.

Although this Court was aware that Chairman Liebeler had departed the Commission prior to remand, *see* Slip Op. 90-66, this fact, of course, cannot be construed to disrupt the work of the Commission. As the court held in *SCM,* remands to the Commission ordering explanations of the views of individual members require an "institutional response" irre-

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[8] In *Washington Red Raspberry,* this Court affirmed the results of the International Trade Administration's second remand determination after finding that the determination was based upon substantial evidence within the meaning of 28 U.S.C. § 1516a(b)(1)(B). The Court of Appeals for the Federal Circuit (CAFC) affirmed, stating that:

> The appropriate standard of review of a final antidumping determination is limited to whether that determination is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' It is in view of this standard that we review the [remand] determination before us.

859 F.2d at 902 (Fed. Cir. 1988).

spective of the makeup of the Commission's membership at the time it receives remand instructions. 2 CIT at 7, 519 F. Supp. at 916. Furthermore, the *SCM* holding requires in the instant case that on remand the Commission is to be left with the task of responding as an *institution* and, at its option, to either correct or explain the Liebeler error. 2 CIT at 7, 519 F. Supp. at 916. No argument has been advanced nor any evidence in the record discovered that Commissioners Lodwick and Newquist applied the analysis of Chairman Liebeler deemed defective by this Court in Slip Opinion 90-58. This Court finds that the Commission complied with this Court's remand instructions.

C. *Review of the Remand Determination for Substantial Evidence:*

The statutory requirements for Commissioners to consider in making final determinations concerning material injury are set out in 19 U.S.C. § 1677(7)(B) and (C) (1982). Those subparagraphs read as follows:

> (B) Volume and consequent impact
>
> In making its determinations under sections 1671b(a), 1671d(b), 1673b(a), and 1673d(b) of this title, the Commission shall consider, among other factors—
>
> (i) the volume of imports of the merchandise which is the subject of the investigation,
>
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (iii) the impact of imports of such merchandise on domestic producers of like products.
>
> (C) Evaluation of volume and of price effects
>
> For purposes of subparagraph (B)—
>
> (i) Volume
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price
>
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) Impact on affected industry
>
> In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices, and
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C. § 1677(7)(B) and (C) (1982).

This Court now turns to an examination of whether the Lodwick and Newquist determinations passed muster as to the statutory test.[9]

(1) *Views of Commissioner Lodwick:*

The views of Commissioner Lodwick demonstrate that he considered the volume, effect, and impact of the imported merchandise in determining whether there was material injury. He concluded that the impact of the increasing volume and penetration of less than fair value (LTFV) imports of welded stainless steel pipes and tubes from Sweden priced to undercut domestic prices was visible upon the financial performance of the domestic industry. He further concluded that the subject imports were a cause of material injury to the domestic steel industry. *Dissenting Views of Commissioner Eckes and Commissioner Lodwick on Welded Stainless Steel Pipes and Tubes from Sweden (Lodwick's Views),* USITC Pub. 2033, at 64.

AST's position that Commissioner Lodwick's views are based upon a single factor or neglected to tie observed volume trends and price effects is not supported by the record. Commissioner Lodwick made the following relevant observations on the condition of the domestic industry in the most recent year of the investigation, 1986:

> In a weak and highly competitive market, Swedish imports are increasing in volume and market penetration. There is evidence of general price undercutting by these LTFV imports, and also price suppression. Throughout the period of investigation, the performance of the domestic industry as a whole has been poor.
>
> * * * * * * *
>
> The operating levels of the domestic industry declined in 1986, with domestic shipments and capacity utilization falling to their lowest points during the investigative period.
>
> * * * * * * *
>
> Employment factors also deteriorated in 1986. Both hours worked and total compensation fell to their lowest annual levels of the investigative period, while productivity remained stable. In interim 1987, hours worked and total compensation continued to fall, although productivity improved slightly.

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[9] Although the Trade Agreements Act of 1979 requires the Commission to consider the statutory factors outlined in the text of this opinion, Congress apparently did not intend to mandate discussion of every factor. In *Jeannette Sheet Glass Corp. v. United States,* the court opined that "Congress did not mandate the Commission to discuss every facet of its investigation, but only 'material issues of law or fact.'" 9 CIT 154, 161, 607 F. Supp. 123, 130 (1985) (quoting House Doc. No. 96-153, 96th Cong., 1st Sess. 27 (1979), reprinted in 1979 U.S. Code Cong. & Ad. News 665, 685).

> Financial performance indicators reflect the same conditions as operating and employment factors. Net sales were lower in 1986 than in 1984 or 1985, and operating losses incurred in all three years.

See Lodwick's Views, USCIT Pub. 2033, at 61–62.

Commissioner Lodwick then provided specific data (or reference thereto) to address the three general statutory criteria outlined in 19 U.S.C. § 1677(7)(B) and (C) (1982)—import volume, price effects, and causation. With respect to import volume, Commissioner Lodwick found that "[t]he volume of imports from Sweden increased more than 50% from 1844 short tons in 1984 to 2822 short tons in 1986." *Lodwick's Views,* USCIT Pub. 2033, at 63. Further, he found the volume of "[i]mport penetration rose concomitantly [sic] from 2.4% in 1984 to 3.7% in 1986." *Id.* In discussing price effects, Lodwick found that the "increase in import volume and penetration was achieved with general undercutting of domestic prices[,]" based upon "[i]nformation on purchases by distributors * * *." *Id.* Lastly, Commissioner Lodwick tied the above price and volume data to the condition of domestic producers. He stated that "[t]he impact of this increasing volume and penetration of LTFV imports from Sweden, which were priced to undercut domestic prices, is clearly visible in the poor operating and financial performance of the domestic industry." *Id.* at 64.

Drawing upon relevant data, Commissioner Lodwick discussed the three salient statutory factors and reached a reasonable conclusion that this Court will not disturb absent strong indications that the determination was based upon some clear error of judgment. This Court finds that AST has failed to overcome the presumption of correctness attached to Commissioner Lodwick's determination. 28 U.S.C. § 2639(a)(1) (1988).

This Court holds that the Commissioner Lodwick's determination was supported by substantial evidence on the record and is otherwise in accordance with law.

(2) *Views of Commissioner Newquist:*

Commissioner Newquist, who succeeded Commissioner Liebeler, declined to examine the so-called "five-factor test" utilized by Chairman Liebeler, examined the record, applied the statutory test set forth at 19 U.S.C. § 1677(B) and (C) (1982), and made an affirmative finding of injury. As Commissioner Lodwick, Commissioner Newquist based his determination on information derived from questionnaire responses from producers which were estimated to account for approximately ninety percent of all U.S. shipments of the subject welded product. *Staff Report to the Commission* (Report), in Administrative Record, List 2, Doc. 17, at

A–32.[10] He found that the volume and market share of imports had increased and that the subject imports were consistently priced to undercut the domestic like product.

In examining import volume and market penetration, he found that:

> The volume of LTFV imports from Sweden rose steadily from 1984 through 1986, increasing from 1,844 short tons in 1984 to 2,191 in 1985 and 2,822 short tons in 1986. As a share of the domestic market, subject imports increased (by volume) from 2.4 percent in 1984, to 2.8 percent in 1985, to 3.7 percent in 1986. Measured by value, market penetration by the subject imports rose from 2.0 percent in 1984 and 1985, to 2.7 percent in 1986. [footnote omitted] These data, however, understate the market presence of the subject imports in 1986, when the importer, Avesta Stainless, Inc., drew down substantially on accumulated inventories * * *.

Newquist's Views, USCIT Pub. 2304, at 6.

Commissioner Newquist stated that increases in volume, value, and market penetration of the subject imports coincided with a decrease in the market share held by domestic producers. *Id.* at 7. As Commissioner Lodwick, Commissioner Newquist found "consistent price undercutting by the subject imports over most of the period of investigation" *Id.* at 8. For example, the Commissioner stated that "[i]n 28 of 33 quarterly price comparisons of imported and domestic grades of A-312 pipe, the subject imports undersold the domestic product, in most instances by margins ranging from 10 to 38 percent."[11] *Id.* at 8.

AST's argument that its price undercutting did not have an injurious impact on the domestic industry because suppliers chosen by producers were largely dictated by non-price factors—particularly longer lead times involved in obtaining Swedish imports—was adequately addressed by Commissioner Newquist. Commissioner Newquist discussed several factors which might have had an impact upon price competition between the Swedish welded imports and the like product and concluded that these factors did not substantially reduce price competition. Citing to the Staff Report, he found that up until 1986, import sales were made from AST's U.S. warehouse, where the lead time was two weeks or less. Further, "th[e] difference in lead times narrowed toward the end of the period of investigation when constraints on the supply of raw materials increased the lead time required in purchasing from U.S. producers." *Newquist's Views,* USCIT Pub. 2304, at 9.

The above analysis of the impact of the subject imports on the domestic industry strikes this Court as reasonable. This Court holds that the findings by Commissioner Newquist that the domestic industry suf-

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[10] Additionally, employment data were supplied by firms accounting for 75 percent of reported shipments, Report at A-42, n.l.; financial data limited to the welded product were provided by firms accounting for 85 percent of reported shipments, *id.* at A-49, n.l.; and firms accounting for 51 percent of reported shipments supplied pricing data to the ITC. *Id.* at A-85.

[11] Commissioner Newquist noted that "A-312 pipe constitutes a major area of competition in the U.S. market between domestic and Swedish producers of welded stainless steel pipes and tubes." *Newquist Views,* USCIT Pub. 2304, at 8 n.24.

fered substantial injury by reason of the subject imports are supported by substantial evidence on the record and are otherwise in accordance with law.

AST also contends that the data in the record is "grossly insufficient" to support the ITC's injury determination and that Commissioners Lodwick and Newquist should therefore have drawn an "adverse inference" against the domestic industry. In attacking the data base relied upon by the Commission, AST argues in its *Supplementary Objections to Remand Determination* at 6 that: "Only 23 of the 35 U.S. producers provided any response to the Commission's questionnaires, and many of these responses were incomplete. Thus, the Commission did not obtain any information from over one-third of the members of the domestic industry and * * * most of this information was grossly incomplete."

This Court declines to discuss at length the adequacy of the questionnaire responses. This problem was addressed in *Hannibal Indus., Inc. v. United States,* 13 CIT ___, 710 F. Supp. 332, 336 (1989), where the court stated that: "[I]n challenges to the Commission's investigative thoroughness, the court has remanded determinations only for failure to seek necessary information." Further, "the Commission has broad discretion to pursue an investigation in a manner that will provide substantial evidence for its determinations." *Granaes Metallverken AB v. United States,* 13 CIT ___, 716 F. Supp. 17, 25 (1989) (citations omitted). Since it appears from the record that the Commission made adequate attempts to *obtain* relevant data, we cannot say that the failure of certain producers to respond or respond adequately to reasonable Commission inquiries required the Commission to draw some "adverse inference" against the domestic industry. *See Alberta Pork Producers' Mktg. Bd. v. United States,* 11 CIT 563, 580, 669 F. Supp. 445, 459 (1987).

This Court need not spend much time addressing the issue of seeking further participation by Commissioner Liebeler in these proceedings. As articulated in *SCM,* the ITC "is a continuing institution, regardless of changes in its membership." 2 CIT at 7, 519 F. Supp. at 915. Moreover, membership changes within the Commission "do[] not affect its power to discharge its statutory duties (citations omitted)." *Sprague Elec. Co. v. United States,* 2 CIT 302, 309, 529 F. Supp. 676, 682 (1981). As discussed in this opinion, Commissioner Newquist properly complied with the remand order when he employed the proper statutory test to the record before him. Individuals occupy positions of authority within such institutions only when they serve such institutions in their official capacities. This Court is not bound by any statute or case authority cited to order former-Chairman Liebeler to return from private life and explain her original views.[12]

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[12]Although this Court in some circumstances "may require the administrative officials who participated in the decision to give testimony explaining their action[,] * * * such inquiry into the mental processes of administrative decisionmakers is usually to be avoided." (emphasis added). *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971).

The holding in *Borlem, S A. v. United States*, 13 CIT ___, 718 F. Supp. 41 (1989), *aff 'd* Nos. 90-1085, -1086, -1087 (Fed. Cir. Sept. 6, 1990) is inapposite to the instant action. The facts in *Borlem* are peculiar to that case. Furthermore, there are no allegations by AST asserting a mistake as to the facts upon which the ITC's determination was made in the sense of *Borlem*.

IV. Conclusion

This Court holds that the Commission has complied with the remand instructions, and that the remand determination is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, the remand determination of the ITC is affirmed.

(Slip Op. 90–125)

E.T. Horn Co., plaintiff *v.* United States, defendant

Court No. 84-12-01730

Opinion

[On classification of nitrogenous residuum, judgment for the defendant.]

(Decided November 27, 1990)

Stein Shostak Shostak & O'Hara (Joseph P. Cox) for the plaintiff.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Veronica A. Perry)* for the defendant.

Aquilino, *Judge*: This action, which has been designated a test case pursuant to CIT Rule 84(b), challenges classification by the U.S. Customs Service of penta-ethylenehexamine ("PEHA")—"bottoms" and bishexamethylenetriamine ("BHMT") residues from Japan under Schedule 4 of the Tariff Schedules of the United States ("TSUS"), Part 2 ("Chemical Elements, Inorganic and Organic Compounds, and Mixtures") as "Mixtures of two or more organic compounds: * * * Other", item 430.20.[1]

The plaintiff claims that this merchandise should have entered duty free in accordance with TSUS item 793.00, which covered "Waste and scrap not specially provided for".

I

The parties have submitted cross-motions for summary judgment. After review of the pleadings and the papers filed in support of these mo-

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[1] Reliance on this item resulted in duties of 7.9% *ad valorem* as "the highest rate applicable to any component compound" as determined by reference to TSUS item 425.52.

tions, the court concludes that no material facts are in dispute, that trial therefore is not necessary and that this action can be resolved upon the submissions at hand.

An affidavit attached to plaintiff's motion states, in part:

> 4) PEHA Bottoms are the residue of manufacturing processes undertaken to produce ethyleneamines. * * * BHMT Amine Residues are the byproduct of manufacturer's processes undertaken to produce Nylon 66 from hexamethylenediamine.
>
> 5) The[y] * * * are the residues or "bottoms" which remain in the bottom of the receptacle after distillation and production of these amines. The bottoms are unsatisfactory for use with the ethyleneamines and hexamethylenediamines which are the intended products of the manufacturing process.
>
> * * * * * * *
>
> 9) The BHMT Amine Residues are purchased for $986/metric ton FOB Japan and the PEHA Bottoms are purchased for $81.62/100 pounds FOB Japan.
>
> * * * * * * *
>
> 11) After importation, the PEHA Bottoms are sold, in their condition as imported, * * * [and] are reacted with various fatty acids to produce amides, imidazolines, and esters for use as ingredients in the manufacture of oilfield treating chemicals.
>
> 12) BHMT Amine Residues are also sold * * * in their conditions as imported, and also so used, but additionally are reacted with phosphourous [*sic*] acid to produce phosphonates.

The parties agree that the PEHA bottoms are a mixture of diethylenetriamine, tri-ethylenetetramine, tetra-ethylenepentamine, penta-ethylenehexamine, hexa-ethyleneheptamine, hepta-ethyleneoctamine and N-aminoethylpiperazine, each of which is a nitrogenous compound. They also agree that the BHMT residues are a mixture of hexamethylenediamine, bishexamethylenetriamine and N-ethyl hexamethylenediamine, each of which is also a nitrogenous compound. An affidavit filed by the defendant adds, among other points:

> 9. The "PEHA Bottoms" and "BHMT Amine Residues" both contain amines. Amines are nitrogenous organic compounds containing amino groups, designated in chemical formulas, for example, as $-NH_2$ (a primary amine) or –NH– (a secondary amine). Amino groups are polar and hydrophilic. * * * PEHA has two primary amine groups and four secondary amine groups. BHMT has two primary amine groups and one secondary amine group. * * *
>
> 10. These kinds of compounds react with organic acids, specifically so-called fatty acids like oleic acid ($C_{17}H_{33}COOH$). One of the primary amines in each compound forms an amide with the acid, but the other primary amine group and all the secondary amine groups are unaffected. The result is an aminoalkylamide of a fatty acid. * * *
>
> 11. PEHA Bottoms are also used to make * * * a kind of compound known as an imidazoline. Again, the aminoalkane (e.g.,

PEHA) is reacted with a fatty acid, but this time one of the secondary amines also participates in the reaction to form a five-membered ring.

12. Aminoalkylamides of fatty acids and the corresponding imidazolines are, generally speaking, excellent anti-stripping agents. The portion of such compounds which is from the fatty acid is the nonpolar portion which is compatible with the bituminous composition, and the aminoalkyl moiety, which comes directly from the PEHA or BHMT, is the polar portion which is compatible with the mineral aggregate.

13. At [on]e time * * *, the preferred amine compounds were relatively pure materials like diethylene triamine. However, in recent years it has been found that mixtures of amine compounds are just as cost effective, and mixtures like "PEHA Bottoms" and "BHMT Amine Residues" are readily available to meet the paving industry's needs. Accordingly, the trend has been to use these kinds of mixtures to prepare antistripping agents.[2]

As stated above, Customs classified both substances at issue as mixtures of two or more organic compounds. However, discovery in conjunction with this action determined that some 5–11 percent of the BHMT residues by weight was sodium hydroxide, which the defendant now admits was and is inorganic. Defendant's Memorandum, p. 2 and p. 3 ("[t]he provision for mixtures of organic compounds is interpreted by Customs as covering only those mixtures which consist *entirely* of organic compounds") (emphasis in original). Thus, the defendant now takes the position that "the BHMT should have been classified under item 432.25, TSUS, which covers 'mixtures not specially provided for: other: other'". *Id.* at 2.

II

Classification of the BHMT residues under that item would not have changed the rate of duty owed (pursuant to TSUS item 425.52) in view of the other component compounds, but the plaintiff properly argues that no statutory presumption of correctness supports defendant's present position on this particular merchandise, citing for support *United States v. Magnus, Mabee & Reynard, Inc.*, 39 CCPA 1, C.A.D. 455 (1951). When an error such as the one at bar is discovered, the burden of persuasion rests on Customs as to any alternative classification claimed. *See, e.g., Abbey Rents v. United States,* 79 Cust.Ct. 103, C.D. 4720, 442 F.Supp. 540 (1977), *aff'd,* 585 F.2d 501 (CCPA 1978). On the other hand, the presumption set forth in 28 U.S.C. § 2639(a)(1) does apply to defendant's classification of the PEHA bottoms. And, in either instance, the court is mindful of its responsibilities in an action like this, as elucidated by the court of appeals in *Jarvis Clark Co. v. United States,* 733 F.2d 873, *reh'g denied,* 739 F.2d 628 (Fed.Cir. 1984).

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[2] Affidavit of Dr. Murray Jelling. This affidavit further describes the scientific significance of these materials for the durability of asphalts used to pave roadways.

A

Headnote 1 to TSUS Schedule 4, Part 2 (1983) stated that it covered "chemicals, except those provided for elsewhere in this schedule and those specially provided for in any of the other schedules." The defendant claims that "for merchandise which is chemicals to be classified outside of Schedule 4, the chemical must be *specially provided for.*" Defendant's Memorandum, p. 6 (emphasis in original). Since the plaintiff admits that the imports can be described as chemicals, and since its claimed classification was a not-specially-provided-for ("nspf") provision, the crux of the matter according to the defendant is whether the headnote operated to "preclude classification of the imported merchandise in the nspf provision for waste and scrap, item 793.00, TSUS." *Id.* at 11.

The plaintiff attempts to frame the issue as one of relative specificity under General Interpretive Rule 10(C), the substance of which is that an article described in two or more provisions is to be classified under the one which describes the merchandise more specifically. *See, e.g., J. Gerber & Co. v. United States,* 62 Cust.Ct. 368, C.D. 3773, 298 F.Supp. 516 (1969), *aff'd,* 436 F.2d 1390 (CCPA 1971). The plaintiff argues that the aforementioned basket provision for waste and scrap did specially provide for the subject imports, was more specific than the basket provision for chemicals, and therefore satisfied the relevant headnote. It refers to the Tariff Classification Study of November 15, 1960 ("TCS") explanatory notes to Schedule 4, which state (at page 55):

> * * * [P]art 2 is essentially a "basket" part of schedule 4 in that it includes all important inorganic and organic chemicals itemized separately which are not specially provided for elsewhere in the schedules.

The plaintiff reasons that, since there was no separate itemization for "bottoms" and "residues" in Part 2, the merchandise was not classifiable thereunder.

The defendant responds that General Interpretive Rule 10 (c) is inapposite but that, even if it were applicable, the doctrine of relative specificity favors the Service's classification because the item the plaintiff proffers was under "Products Not Elsewhere Enumerated", Schedule 7, Part 13, whereas the item(s) on which Customs relies were subsumed in "Chemical Elements, Inorganic and Organic Compounds, and Mixtures".

When an article is determined to be "clearly described" in two or more items, "selection of the controlling item by relative specificity is mandatory and takes precedence over other judge-evolved methods of resolving ambiguity, including resort to extrinsic aids such as legislative history." *F.L. Smidth & Company v. United States,* 409 F.2d 1369, 1376, C.A.D. 958 (CCPA 1969). In this action, the question, of course, is whether the merchandise was so described in the provisions pressed by each side. Phrased another way, were those provisions independently

apposite? The answer depends primarily on whether "chemicals", as used in headnote 1, encompassed waste and scrap thereof.

The word "chemical" is defined in The Oxford English Dictionary (2d ed. 1989) (at page 82 of volume III) as, among other things, "[r]elating or belonging to the practice of chemistry; (of substances) obtained by the operations of chemistry" and as a "substance obtained or used in chemical operations." Webster's Third New International Dictionary (1981) defines the noun (at page 384) as

> a substance (as an acid, alkali, salt synthetic organic compound) obtained by a chemical process, prepared for use in chemical manufacture, or used for producing a chemical effect * * *.

As an adjective, chemical means

> relating to applications of chemistry: as a: acting or operated by chemical means * * * b: treated with or performed by the aid of chemicals * * * c: produced by chemical means or synthesized from chemicals * * * d: suitable for use in or used for operations in chemistry * * *.

Id. at 383. *See also* Funk & Wagnalls Standard Dictionary of the English Language, p. 227 (Int'l ed. 1963).

As for the definition of waste, in *Patton v. United States,* 159 U.S. 500, 503 (1895), the Supreme Court stated that

> the prominent characteristic running through all the[] definitions is that of refuse, or material that is not susceptible of being used for the ordinary purpose of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable and used for purposes for which merchantable material of the same class is unsuitable.

In *Harley Co. v. United States,* 14 Ct.Cust.App. 112, 115, T.D. 41644 (1926), the court opined that, in

> the tariff sense, waste is a term which includes manufactured articles which have become useless for the original purpose for which they were made and fit only for remanufacture into something else. It also includes refuse, surplus, and useless stuff resulting from manufacture or from manufacturing processes and commercially unfit, without remanufacture, for the purposes for which the original material was suitable and from which material such refuse, surplus, or unsought residuum was derived.

See also Cia. Algodonera v. United States, 23 CCPA 42, 45, T.D. 47686 (1935); *United States v. C.J. Tower & Sons,* 38 CCPA 131, 136, C.A.D. 450 (1951).

According to the drafters of the TSUS, Schedule 4 was intended to be

> primarily a classification system for chemicals and closely related chemical products. It places all chemicals and related products in a systematic, logical arrangement, using terminology which takes cognizance of the vast changes which have occurred in the chemical

> field since 1930, and eliminates anomalies and archaic and illogical classifications. The chemical industry introduces tens of thousands of new products to commerce each year and about half of the current sales of chemicals today are products unknown twenty years ago. Schedule 4 provides for these developments and anticipates, so far as practicable, such changes in the character of international trade as may occur in the near future.
>
> In proposed schedule 4, wherever possible the products have been described in technical, chemical terminology. The use of such terminology imparts greater certainty to the tariff descriptions. Persons trading in chemicals are generally familiar with technical descriptions no matter how they may otherwise describe their goods. Of course, it is not intended that the use of scientific description impose upon chemical elements or chemical compounds any requirement of laboratory purity.

TCS Schedule 4 Explanatory Notes, p. 2. *Cf. Standard Chlorine Chemical Co. v. United States,* 13 CIT ____, ____, 725 F.Supp 539, 541 (1989):

> Tariff terms can be defined normally by their common or commercial meaning, but the legislative history underlying Schedule 4 manifests congressional intent that technical/scientific definitions control classification problems thereunder.

The basket provision for waste and scrap in the Tariff Act of 1930 had been paragraph 1555, which occasionally was held to cover waste chemical in nature. *See, e.g., Standard Oil Co. (Louisiana) v. United States,* 6 Cust.Ct. 237, C.D. 471 (1941) (light refinery gases). After adoption of the TSUS, paragraph 1555 entailed 23 specific provisions for waste and scrap.[3] The expectation apparently was that those new provisions would enhance tariff treatment of offal, but the drafters specified that "[n]o change in tariff treatment [wa]s involved for such waste and scrap as remains in th[e] basket provision of item 793.00." TCS Schedule 7 Explanatory Notes, p. 477.

Customs has classified waste of a chemical nature under that item, although a notable feature of those substances has been unsuitability for chemical use or purposes in the conditions imported without further processing. *See, e.g.,* T.D. 70-108, 4 Cust. B. & Dec. 230 (1970)(spent cracking catalyst); T.D. 69-51(16), 3 Cust. B. & Dec. 82 (1969)(distillation residue of fatty acids, fatty esters and unsaponifiable material); T.D. 68-66(17), 2 Cust. B. & Dec. 125 (1968)(residue from distillation of 1,1,1–trichloroethane having no commercial use except for recovery of chemicals contained therein); T.D. 68-17(15), 2 Cust. B. & Dec. 33 (1968) (contaminated degreasing solvents consisting of waste oil and

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[3] *See* TCS Proposed Revised Tariff Schedules of the United States at 796. As originally proposed, in addition to item 793.00, they were item 156.55 (residue from processing of cocoa beans); item 200.10 (wood waste); items 304.02, 304.12, 304.20, 304.32, 304.38, 304.42, 304.46, 304.50 and 304.56 (waste and advanced waste of vegetable fibers, except cotton); items 390.12, 390.40, 390.50 and 390.60 (rags and scrap cordage); item 540.14 (waste or scrap glass); items 603.50, 603.55 and 603.65 (other metal bearing materials); item 605.70 (precious metal waste and scrap); item 724.50 (photographic film scrap and waste); and item 771.15 (rubber or plastic waste and scrap). *See also* Summaries of Trade and Tariff Information, Schedule 7, vol. 8, p. 111 (1968).

chlorinated solvents from industrial operations, in no definite proportions but averaging 40 to 50 percent contaminants, imported for reclamation of the solvents); T.D. 66-47(18), 101 Treas.Dec. 150 (1966) (crude sulphate turpentine consisting of a mixture of mercaptans and disulfides varying in ratio to sulfate turpentine); T.D. 56551(134), 100 Treas.Dec. 923 (1965) (tall oil pitch from fractional distillation of tall oil); T.D. 56462(101), 100 Treas. Dec. 378 (1965)(spent sulphuric acid, for recovery and decomposition); T.D. 56205(73), 99 Treas.Dec. 415 (1964)(spent automotive motor oil); T.D. 56124(115), 99 Treas.Dec. 171 (1964) (waste wood distillation liquor). *Cf.* T.D. 78-369, 12 Cust. B. & Dec. 788 (1978) (unnecessary to consider whether "opcolig" should have been classified under item 793.00 rather than under item 465.92 as "lignin sulphonic acid and its salts" since the precipitate had been advanced prior to importation).

A raw material or product usually has been favored under the import laws, while a material or product improved abroad usually has been subject to a higher rate of duty upon entry. *E.g., United States v. Grasselli Chemical Co.*, 5 Ct.Cust.App. 320, T.D. 34527 (1914); *Charles T. Wilson Co. v. United States*, 28 CCPA 63, C.A.D. 126 (1940). Also, it has not been general policy for material from used or spent products to be dutiable at the same rate as new material. *E.g., United States v. Chelsea Bag & Burlap Co.*, 11 Ct.Cust.App. 255, T.D. 39079 (1922). Thus, to distinguish between chemical products and chemical waste accords with the traditional approach of tariffs.

Since there were no provisions for chemical waste in Schedule 4, and since Customs has regarded waste of that kind as classifiable other than under that schedule, the court concludes that "chemical" and "waste and scrap" are mutually-exclusive classifications. Ergo, headnote 1 of Part 2, Schedule 4 covered chemicals and was not applicable to waste and scrap, and the imports at bar were either chemicals or waste, but they were not both.

B

The plaintiff points out that its imports were residuum of manufacturing processes, that quantities of them are necessarily limited by, and dependent upon, the manufacture of other products, and that the composition of the merchandise varies from process to process. The plaintiff argues that, since the residuum is "unsought", is commercially unfit for the purposes for which the desired chemical products of the manufacturing processes (ethylene and hexamethylene amines) are used, and is bought, sold and used as waste, it was classifiable as claimed.

To be controlling of classification, a chemical must be "in a quantity sufficient to perform a useful function or part of the primary function of the merchandise". *Dow Chemical Co. v. United States*, 10 CIT 550, 554–55, 647 F.Supp. 1574, 1579–80 (1986), citing *Northam Warren Corp. v. United States*, 475 F.2d 647 (CCPA 1973), and *United States v. Cavalier Shipping Co.*, 478 F.2d 1256 (CCPA 1973). Here, the court finds that PEHA bottoms and BHMT residues are names of chemicals

known in the industry as such, that they possess identifiable chemical properties and that they are traded for those properties. There is little indication of uselessness of the merchandise in the condition imported. On the contrary, it appears that the PEHA and BHMT, like the ethylene and hexamethylene amines primarily produced with them, function in their natural conditions as chemical intermediates. *See* Plaintiff's affidavit, paras. 11, 12; Defendant's Exhibit A, paras. 911; Jelling affidavit, paras. 9–11, 13–15. In other words, the products at issue are useful and are used as is to make desired end products.

III

The plaintiff has not persuaded the court that recycling, salvaging or remanufacturing is necessary for the PEHA bottoms and BHMT residues to achieve desired end results. Considering the matter in a light most favorable to the plaintiff, it appears nonetheless that a market exists for these materials because of the chemical properties in their states as imported. They are chemicals which are manufactured by chemical processes by firms engaged in the manufacture of chemicals, and they are known by their chemical names and are bought and sold as chemicals. That something is a residue of a process does not automatically render the substance waste, entitled to entry duty-free. Changes in technology or demand can and do render what was once waste matter which is sought for its own sake. In sum, the plaintiff has not overcome the presumption that the PEHA bottoms were correctly classified under TSUS item 430.20, while the defendant has persuaded the court that the BHMT residues were classifiable under item 432.25, albeit with no resultant change in the amount of duties owed.

Judgment will enter accordingly.

(Slip Op. 90–126)

R. DAKIN & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-11-01431
Test Case

Plaintiff challenges Customs' classification of imported merchandise liquidated under item 737.24, Tariff Schedules of the United States ("TSUS"), as "dolls, other," dutiable at the rate of 14.1 percent and 13.4 percent ad valorem.

Held: The subject entries were properly classified as "dolls" under item 737.24, TSUS. [Defendant's motion for summary judgment is granted; action dismissed.]

(Dated November 30, 1990)

Stein Shostak Shostak & O'Hara (S. Richard Shostak and Robert Glenn White), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U. S. De-

partment of Justice *(Mark S. Sochaczewsky)*; of counsel: *Stephen Berke,* U.S. Customs Service, for defendant.

Memorandum Opinion

Tsoucalas, *Judge*: Plaintiff, R. Dakin & Company, brings this action pursuant to 19 U.S.C. § 1514 (1982 & Supp. V 1985) to challenge the United States Customs' ("Customs") classification of merchandise as "dolls, other" under item 737.24, TSUS, with duty assessed at the rate of 14.1 and 13.4 percent (depending on the date of entry). All liquidated duties have been paid and administrative remedies exhausted. Accordingly, this Court's jurisdiction is properly invoked under 28 U.S.C. § 1581(a) (1982).

Background

Between August 21, 1984 and April 15, 1985, plaintiff was the importer of record on various entries from Korea of merchandise invoiced as "Kari-Me Baby."[1] The article at issue, which all parties agree was designed to resemble a newborn infant wrapped in a blanket, is essentially a puppet-like toy made up of a doll head and hands attached to a sleeve of bunting. There is an opening in the rear of the bunting in which one's arm can be inserted to manipulate the puppet.

Upon liquidation, Customs classified the goods as "dolls, other" under item 737.24, TSUS, and assessed duties at the rate of 14.1 and 13.4 percent ad valorem (depending upon the date of entry). Plaintiff filed timely protests to the classification, maintaining that the merchandise should have been classified as "toys, and parts of toys, not specially provided for" and entered duty free pursuant to the Generalized System of Preferences ("GSP").[2] The protests having been denied, plaintiff initiated this action for judicial review.

The action, designated a test case, is presently before the court on cross motions for summary judgment upon a joint statement of facts. Oral argument on these motions was heard by the Court on August 22, 1990.

Discussion

Customs' classifications are presumed to be correct. 28 U.S.C. § 2639(a)(1)(1982). The burden of proving otherwise rests upon the party challenging it. *Id.*; *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786 (Fed. Cir.), *cert. denied,* 109 5. Ct. 369 (1988); *Jarvis Clark Co. v. United States,* 733 F.2d 873 (Fed. Cir.), *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984).

Customs classified the merchandise under item 737.24, TSUS, which provides the following:

SCHEDULE 7, Part 5

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[1] The invoice lists assorted styles of what is essentially the same article. They are referred to as Kari-Me Baby, item 080360; Kari-Me Baby (Ethnic), item 08-0430; Boy Kari-Me Baby, item 08-0550; Kari-Me Baby Pink, 07-0162; Kari-Me Baby Blue, item 070163; and Kari-Me Baby and Teddy, item 07-0164.

[2] It is not disputed that the merchandise at issue is a product made wholly in Korea, a country eligible for beneficial tariff treatment under the GSP.

Dolls, and parts of dolls including doll clothing:

* * * * * * *

Other:

Dolls (with or without clothing):

* * * * * * *

737.24 Other ..... 14.1% ad val.

Plaintiff maintains the merchandise, which it describes as puppets, cannot be properly classified within this item because they lack an essential characteristic of dolls, namely, a torso. Instead, plaintiff contends the articles are best classified under item A* 737.95, TSUS.[3]

It is well settled that substantial deference should be afforded to common and commercial meanings of a given term when determining its proper interpretation for tariff purposes. *Toyota Motor Sales, Inc. v. United States,* 7 CIT 178, 182, 585 F. Supp. 649, 653 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985). It is equally ensconced that courts may refer to dictionaries and other lexicographic authorities to ascertain the common meaning of the terms. *Mast Indus., Inc. v. United States,* 9 CIT 549, 552 (1985), *aff'd,* 786 F.2d 1144 (Fed. Cir. 1986).

Common definitions for the term "doll" include an "*image* of a human being (commonly of a child or lady) used as a plaything," *The Oxford English Dictionary* 937 (2d Ed. 1989) (emphasis added); and "a small-scale figure of a human being (as of a baby or child) used esp. as a child's plaything; b: puppet," *Webster's Third New International Dictionary, Unabridged* 669 (1981); as well as "a child's toy representing a person; a *puppet,*" *Funk & Wagnalls Standard Dictionary Combined with Britannica World Language Dictionary* 376 (Int'l Ed. 1963) (emphasis added); and "a child's toy modelled, however crudely, in human or animal form." *The New Encyclopedia Britannica* 156 (15th Ed. 1986). The broad definitional spectrum of the term would seem to indicate then, contrary to plaintiff's assertions, that a liberal interpretation of "doll" is commonplace.

The lexicographic history of the term "puppet," which Dakin itself admits the articles to be, further hinders plaintiff's argument. The word "puppet" is derived from the Middle French "poupette" – meaning little doll, and the modern French "poupee" – meaning doll. *See Webster's Third New International Dictionary Unabridged* 1844 (1986). More-

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[3] Item A* 737.95, TSUS, provides in pertinent part:

SCHEDULE 7, Part 5

Toys, and parts of toys, not specially provided for:

* * * * * * *

Other:

* * * * * * *

A* 737.95 Other ..... 10.9% ad val.

Articles for which the designations "A" or "A*" appear in the column entitled "GSP" of the schedules are those designated by the President to be eligible articles for purposes of the GSP pursuant to Section 503 of the Trade Act of 1974. Whenever an eligible article is imported into the customs territory of the United States directly from a country or territory listed in subdivision (c)(i) of this headnote, it shall receive duty-free treatment.

over, lexicographic sources define "puppet" as "a small-scale figure of a human or other living being often constructed with jointed limbs, appropriately painted and costumed, and moved usu. on a small stage by a rod or by hand from below or by strings or wires from above; DOLL la" and a "figure (usually small) representing a human being; a child's doll." *Id.*; *The Oxford English Dictionary* 855. These definitions provide clear indication that puppets are included within the broader realm of dolls. Indeed, the cross-referencing of the definitions of "doll" and "puppet" demonstrates that the terms are not only mutually inclusive, but also virtually synonymous.

The meaning of the term "doll" for customs purposes is equally broad-based. For example, Customs determined that imported broom dolls *without* limbs were classifiable as dolls, because the "illusion" of limbs was created. *Customs Headquarters Ruling* 057131 (Oct. 3, 1978). Similarly, dolls "giving the impression of blouse sleeves protruding from a burlap jumper which extends all the way to the ground, hiding the fact that there are no legs or feet," were classifiable as dolls under the TSUS. *New York Seaport Area letter* 826847 (Feb. 1, 1988).

In fact, Customs has in the past specifically stated that the absence of legs or torso *would not* preclude an otherwise doll-like figure from being classified as a doll, and that the "only requirement [for classification as a doll] is that the figure be a full bodied *representation* of a character with human characteristics." *Customs Headquarters Ruling* 065423 (Jan. 22, 1981) (emphasis added); *see also Customs Headquarters Ruling* 075101 (Jan 30, 1985). Hence, the Court finds no lexicographic or commercial basis for plaintiff's contention that a limited definition of the term "doll" should be adopted in this case, nor does it find in the common definitions any requirement that a doll possess a torso or body. Neither has caselaw created such a standard.

To the contrary, the pertinent caselaw adopts a broad definition of the term "doll" for classification purposes. Indeed, the term "doll" has traditionally been interpreted to encompass a vast variety of merchandise. *See e.g., Russ Berrie & Co. v. United States,* 76 Cust. Ct. 218, 224, C.D. 4659, 417 F. Supp. 1035, 1040 (1976); *Brechner Bros. v. United States,* 58 Cust. Ct. 272, 276, C.D. 2959 (1967). To be classifiable under the TSUS provision for dolls, a "doll" is not even required to possess distinct human features as long as "its overall effect is representative of a human." *Wregg Imports v. United States,* 10 CIT 679, 680 (1986). The court in *Wregg,* when determining the proper classification of nested "matreshka doll," noted that:

> After examination of the relevant caselaw in which particular articles were adjudged to be dolls or not dolls, the Court finds no requirement that a doll have distinct arms, legs and other human features. Often dolls do not have identifiable hands, fingers, toes, feet, ears and other human attributes, while some dolls only have these and similar features such as nose, mouth, and eyes painted-on.

10 CIT at 680.

Upon examination of the subject merchandise, it is obvious that while the "Kari-Me Babies" do not possess tangible torsos, they are clearly a representation of full bodied babies. This is most persuasively evidenced by the significant resemblance that the articles bear to a fully limbed infant wrapped in a blanket. Thus, considering the flexible criteria that has traditionally been applied for the classification of dolls, there is little doubt that the "Kari-Me Baby" is a "doll" within the common commercial meaning of that term.

Finally, the Court finds additional reinforcement for this conclusion in plaintiff's own repeated references to the subject merchandise as dolls. *See Defendant's Exhibits* A, B, C, D, E and F. Consumer and trade magazines refer to the subject merchandise as dolls. *Defendant's Exhibit* M. The patent application filed by plaintiff also refers to the article as a doll and plaintiff referred to the articles as dolls in its press releases, brochures and ordering literature. *Defendant's Exhibits* I, J and N.

Although, while it is true, as Dakin maintains, that the manner in which an article is merchandised is not solely determinative in the classification of the merchandise, it is most certainly clear that the importer's own consistent reference to the subject merchandise as a "doll" is a factor – albeit not the only one – to be considered for tariff classification purposes. *See Russ Berrie,* 76 Cust Ct. at 226, 417 F. Supp. at 1041; *S.Y. Rhee Importers v. United States,* 61 CCPA 2, 4, C.A.D. 1108, 486 F.2d 1385, 1387 (1973); *Novelty Import Co. v. United States,* 53 Cust. Ct. 274, 276, Abs. 68780 (1964).

Hence, in the instant action plaintiff has failed to overcome the presumption of correctness that attaches to Customs' classifications. 28 U.S.C. § 2639(a)(1); *Jimlar Corp. v. United States,* 11 CIT 501, 670 F. Supp. 1001 (1987). Accordingly, the Court finds that Customs' classification of the imported merchandise under item 737.24, TSUS, is affirmed and plaintiff's action is dismissed.

(Slip Op. 90–127)

ROSE BEARINGS LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, THE TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89-06-00341

Defendant-intervenor moves to dismiss this case under Rule 12(b)(5) of the rules of this Court. Defendant-intervenor asserts that plaintiff has failed to state a claim upon which relief can be granted because plaintiff was the subject of a negative final determination and is not subject to the antidumping duty order that it has appealed.

Held: Plaintiff's action is premature since plaintiff prevailed at the administrative level and is not subject to any antidumping duties.

[Defendant-intervenor's motion to dismiss is granted. Case dismissed.]

(Dated November 30, 1990)

Tanaka, Ritger & Middleton (*Michele N. Tanaka, Alice L. Mattice* and *Michael J. Brown*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *Douglas Cohen*, Attorney-Advisor, Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon. Jr.* and *William A. Fennell*) for defendant-intervenor.

MEMORANDUM OPINION

TSOUCALAS, *Judge*: Defendant-intervenor, The Torrington Company ("Torrington"), has moved to dismiss the action filed by plaintiff, Rose Bearings Ltd. ("Rose"). Plaintiff appealed from the May 1989 final determinations by the United States Department of Commerce, International Trade Administration ("ITA") concerning antifriction bearings from the United Kingdom. *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof From the United Kingdom: and Final Determination of Sales at Not Less Than Fair Value: Spherical Plain Bearings Parts Thereof From the United Kingdom*, 54 Fed. Reg. 19,120 (1989).[1] Torrington moves for dismissal pursuant to Rule 12(b)(5) of the rules of this Court, asserting that plaintiff's Complaint fails to state a claim upon which relief may be granted.

Plaintiff manufactures plain bearings in the United Kingdom ("UK") for export to the United States. After an investigation of whether sales of imported antifriction bearings were at less than fair value ("LTFV"), the ITA determined that "spherical plain bearings from the UK are not being, nor are likely to be, sold in the United States at less than fair value." 54 Fed. Reg. at 19,120. Hence, plaintiff was not subject to any antidumping duties. Nonetheless, Rose filed a complaint on July 10, 1989, appealing from the determinations and contesting the ITA's standing and scope determinations.

Torrington and the Government claim that, since Rose was not subject to the antidumping duty order that it has appealed, there is no live case or controversy. Thus, this Court can grant no relief to Rose and the action should be dismissed. Rose counters that, since Torrington has contested the determinations regarding spherical plain bearings, there is a possibility that the court will remand the case to the ITA, and the ITA may then reconsider its decision and impose antidumping duties on Rose.[2] Furthermore, since the issues which concern Rose, namely,

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[1] Initially, plaintiff's action contested both the ITA determinations and those of the United States International Trade Commission ("ITC"). *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, USITC Pub. 2185 (May 1989). However, on February 20, 1990, this Court ordered the action severed and those parts of the Complaint that challenge the ITC's determination now are covered by Court No. 89-06-00341S.

[2] Torrington challenged the ITA determinations regarding the UK investigation in court No. 89-06-00311.

standing and scope, currently are before the court in a number of other cases relating to the same determinations, Rose feels this is its only opportunity to be heard on those issues.

The Supreme Court has stated many times that federal courts have no power to decide issues that do not present a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (citations omitted). A court can adjudicate only those matters which involve actual cases or controversies and only where the court's exercise of jurisdiction "can redress some injury suffered by a litigant." *Nuove Industrie Elettriche di Legnano S.p.A. v. United States*, 14 CIT ____, ____, 739 F. Supp. 1567, 1569 (1990).

Rose's not-so-rosy scenario, that the court *may* remand the case and that the ITA may reverse its finding as to spherical plain bearings, is precisely the type of situation which calls for an advisory opinion, and the court is barred explicitly from issuing such a ruling. *Id.*; *see also McKechnie Bros. (N.Z.) Ltd. v. United States Department of Commerce*, 14 CIT ____, ____, 735 F. Supp. 1066, 1068 (1990). *If* the case is remanded and *if* the ITA then imposes antidumping duties on Rose's bearings, Rose could then bring an action challenging the remand determination.

Rose would not be barred from contesting a remand determination where the new decision adversely affects it, and where Rose had no cause or right to contest the original determination. *See Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985). A determination by the ITA on remand that Rose is liable for antidumping duties due to LTFV sales would be a reversal of its original decision and, therefore, would constitute a "new determination" entitling Rose to institute a new action. *Al Tech Specialty Steel Corp. v. United States*, 10 CIT 263, 266, 633 F. Supp. 1376, 1379 (1986); *Alhambra Foundry Co. v. United States*, 12 CIT ____, ____, 685 F. Supp. 1252, 1263 (1988). At this time, however, Rose's action is premature.

Rose also contends that a later action regarding the standing and scope determinations would be futile because they are "general issues" currently before the court and likely to have been decided by the time any possible remand determination is issued. Our appellate court has stated that, in general, a prevailing party may not appeal an administrative determination merely "because [it] disagrees with some of the findings or reasoning." *Freeport*, 758 F.2d at 634. Here, Rose prevailed at the administrative level yet seeks to challenge the findings with which it disagrees. Clearly, such a challenge cannot be heard by the court at this time.

Furthermore, since Rose is an intervenor in *The Torrington Co. v. United States*, Court No. 89-06-00311, it already has the opportunity to be heard on the issues of standing and scope relating to the United King-

dom investigation. Its own action, however, is premature and must be dismissed.

(Slip Op. 90–128)

CHARLES JACQUIN ET CIE., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89-02-00105

[Motion for summary judgment denied.]

(Decided December 10, 1990)

Sharretts, Paley, Carter & Blauvelt (*Allan H. Kamnitz*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Susan Burnett Mansfield*); Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service (*Chi S. Choy*), for defendant.

DICARLO, *Judge*: This action concerns the proper tariff classification of spreadable fruit products made from black cherries, peaches, apricots and plums which were imported from France. Customs classified the merchandise under various provisions of the Tariff Schedule of the United States for "prepared or preserved fruit." Plaintiff asserts the merchandise is classifiable as "jam" under item 153.32, TSUS. Plaintiff moves for summary judgment under Rule 56(a) of the Rules of this Court.

The Court finds there to be a genuine issue of material fact as to the proper classification of the merchandise. Consequently, Plaintiff's motion for summary judgment is denied.

BACKGROUND

The merchandise is manufactured by adding sugar, lemon juice, and liqueur or Cognac to whole or cut pieces of pitted fruit and then boiling the mixture to a thick consistency. The government classified the merchandise as "prepared or preserved fruit" under items 146.99, 148.78, 146.24 and 149.28, TSUS, in Schedule 1, Part 9, Subpart B, TSUS, which is entitled "Edible Fruits." The headnote to Part 9, Subpart B states that "the term '*prepared or preserved*' covers fruit which is dried, in brine, pickled, frozen, or otherwise prepared or preserved, *but does not cover fruit juices, or fruit flours, peels, pastes, pulps, jellies, jams, marmalades or butters*, or candied, crystallized, or glace fruits" (latter emphasis added). Plaintiff contends that because the fruit in the merchandise has been crushed, bruised or reduced to a pulp, it is a jam, classifiable under item 153.32, TSUS, covering jellies, jams, marmalades, and butters. Plaintiff's Memorandum Supporting Motion for Summary Judgment, 8.

DISCUSSION

Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Plaintiff contends that because its merchandise fits within the common meaning of "jam," there is no genuine issue of material fact. Plaintiff's Memorandum at 10.

The meaning of a tariff term is a question of law. *Digital Equip. Corp. v. United States*, 889 F.2d 267, 268 (Fed. Cir. 1989). If congressional intent is clearly expressed in the language of a tariff provision, the court should not inquire further into the meaning of that provision. *Brookside Veneers*, 847 F.2d 786, 788 (Fed. Cir. 1988). If congressional intent is not evident, the court must construe the term according to its common and commercial meaning. *Id.*, 847 F.2d at 789.

Both parties rely on *Goldfarb v. United States*, 55 Cust. Ct. 120, C.D. 2560 (1965), *decision upon retrial*, 64 Cust. Ct. 40, C.D. 3956 (1970). The government cites *Goldfarb* for the proposition that the fruit in jams is "crushed or reduced to a pulp." Defendant's Memorandum Opposing Motion for Summary Judgment, 7. The government also cites a Customs Service Decision which restated the *Goldfarb* test to hold that "[m]erchandise which contains *whole or recognizable* pieces of the fruit or fruits from which manufactured is properly classifiable * * * as prepared or preserved edible fruits." C.S.D. 80-176, 14 Cust. Bull. 1027, 1029 (1979) (emphasis added). Plaintiff, also relying on *Goldfarb*, counters that if the fruit loses its shape or is bruised, crushed or reduced to a pulp, the merchandise is a jam. Plaintiff's Memorandum at 11-12.

In *Goldfarb*, the customs examiner testified that the product contained mostly whole strawberries and "[t]he berries were firm enough so that he could separate them from the syrup with a knife." *Goldfarb*, 55 Cust. Ct. at 123. After consulting dictionaries, the court concluded "a fruit jam is a fruit preserve in which the fruit is jammed, that is, crowded, caught fast, and crushed or bruised." *Id.* at 127. Relying on the testimony that most of the berries were whole and had retained their shape, the court concluded that the mixture was "not a jam in the precise dictionary sense, for the shape of the strawberries is kept. They are not crushed or reduced to a pulp." *Id.*

Plaintiff and defendant also cite a definition of "jam" from Webster's New International Dictionary (2d ed. 1956) which was quoted in *Goldfarb*. According to that definition, jam is "[a] product made by boiling fruit and sugar to a thick consistency, without preserving the shape of the fruit * * *" *Goldfarb*, 55 Cust. Ct. at 127. Plaintiff claims this describes the process used in making its products.

The parties also cite Webster's definition of "preserve" which was quoted in *Goldfarb*. The Court finds this definition unhelpful for two reasons. First, the word "preserve" is included neither within the TSUS item Customs applied, nor in the classification plaintiff proposes. Second, Webster's defines preserve as "[f]ruit canned or made into jams,

jellies or the like" and "[f]ruit cooked with sugar so as to keep its shape." *Goldfarb*, 55 Cust. Ct. at 127. These definitions support the contentions of defendant and plaintiff, respectively. Therefore, neither is dispositive.

The Summaries of Trade and Tariff Information state that "[n]o distinction is made between a jam and a preserve by the [Food and Drug Administration] or by the trade." 8 Summaries of Trade and Tariff Information, Schedule 1, 267 (1969). The Tariff Commission states, however, that a distinction is made for tariff purposes.

> If a fruit is processed and packed in a manner which substantially retains the shape of the fruit, then it is dutiable as a preserve under provisions for "prepared or preserved fruit," and not under the tariff provisions for jams. Conversely, a jam is defined as a product made by boiling fruit and sugar to a thick consistency, without preserving the shape of the fruit. An imported product, properly labeled a jam according to FDA standards, might be dutiable as preserved fruit; similarly, some imported products labeled as a "preserve" (e.g., strawberry preserves) may be dutiable as jam.

Id.

The Court notes it requested further briefing on several questions regarding the application of the *Goldfarb* standard to the plaintiff's merchandise. The Court finds the test enunciated in that case to be difficult to apply to merchandise made of fruits larger than strawberries and to cherries which are at least slightly crushed in the pitting process. It appears, for example, to lead to the result that canned sliced peaches are classifiable as jam because they do not retain the spherical shape of a whole peach. Nevertheless, the lexographic materials, the Summaries of Trade and Tariff Information, the prior rulings of the Customs Service and the case law all indicate that the distinction between jam and prepared or preserved fruits is the size and texture of the pieces of fruit. From this evidence, it appears that the common and commercial meaning of jam does not encompass a product containing pieces of fruit which are both whole or large and also firm enough to be easily separated from the surrounding syrup.

The government argues that summary judgment is inappropriate because there exists a question of fact whether the merchandise contains "recognizable pieces of fruit." Defendant's Memorandum at 17. This question, however, is ambiguous and confusing. The government has not stated whether that question goes to the presence of visible pieces of fruit or to the fact that those pieces are recognizable as a particular fruit. In either event, the Court requires further evidence to determine the fact question whether this particular merchandise falls within the common and commercial meaning of jam.

CONCLUSION

The Court finds a question of material fact regarding the proper classification of plaintiff's merchandise. The Court, therefore, denies plaintiff's motion for summary judgment.

ABSTRACTED CLASSIFIC

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSE
C90/528 11/28/90 Aquilino, J.	Belfont Sales Corp.	86-5-00560	716.09–716.4 715.05 Various rat
C90/529 11/28/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-6-00738	716.09–716.4 715.05 Various rat
C90/530 11/28/90 Aquilino, J.	Miracle Watch Co.	86-6-00740	716.09–716.4 715.05 Various rat
C90/531 11/28/90 Aquilino, J.	S.K. Suppliers	86-6-00736	716.09–716.4 715.05 Various rat
C90/532 11/28/90 Aquilino, J.	Smartime	86-6-00739	716.09–716.4 715.05 Various rat

ICATION DECISIONS

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/533 11/28/90 Aquilino, J.	Temlex Ind. Inc.	86-9-01161-S	716.09–716. 715.05 Various r
C90/534 11/28/90 Aquilino, J.	Wholesale Supply Co.	88-9-00712	716.09–716. 715.05 Various r
C90/535 11/29/90 Aquilino, J.	A Classic Time	87-12-01153	716.09–716. 715.05 Various r
C90/536 11/29/90 Aquilino, J.	Alva Watch Corp.	87-9-00938	716.09–716. 715.05 Various r
C90/537 11/29/90 Aquilino, J.	Alva Watch Corp.	88-2-00158	716.09–716. 715.05 Various r
C90/538 11/29/90 Aquilino, J.	BCC Int'l Ltd.	88-6-00460	700.95 12.5%
C90/539 11/29/90 Aquilino, J.	Delta Impex Watch Corp.	86-4-00438	716.09–716 715.05 Various r

.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches, etc.
.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
6.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
6.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87-136 (1987)	New York Leather trimmed shoes
6.45, rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSES
C90/540 11/29/90 Aquilino, J.	Delta Impex Watch Corp.	86-6-00770	716.09–71 715.05 Various
C90/541 11/29/90 Aquilino, J.	Nastrix Corp.	87-3-00518	716.09–71 715.05 Various
C90/542 11/29/90 Aquilino, J.	Nastrix Corp.	87-8-00871	716.09–71 715.05 Various
C90/543 11/29/90 Aquilino, J.	Nissho Iwai American Corp.	87-11-01146	700.95 12.5%
C90/544 11/29/90 Aquilino, J.	Western Sales	83-1-00104-S	716.09–71 715.05 Various

TION DECISIONS – Continued

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
716.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87-136 (1987)	Portland Footwear
716.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches, etc.

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